No. 234

Office Supreme Court, U.S.
FILED
JUL 11 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

TEXACO INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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TEXACO INC.,

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FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 10, 1962.

Opinions Below.

The opinion and order of the Federal Trade Commission (R. 134a-138a;[1] App. B, *infra*, pp. 1b-5b) are unreported. The opinion of the Court of Appeals (App. A; *infra*, pp. 1a-2a), is reported at 301 F. 2d 662 (1962).

[1] "R." refers to the printed Petition and Appendix filed by petitioner, Texaco Inc., in the Court of Appeals.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 10, 1962 (App. A, *infra*, pp. 1a-2a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented.

Where the Federal Trade Commission erroneously withholds relevant evidence from a respondent in an adjudicative proceeding before it, does an appropriate court of appeals have jurisdiction, before the issuance of a cease and desist order by the Commission, to entertain an application by respondent for leave to adduce the excluded evidence and, indeed, must not such an application be made promptly to avoid waiver of the Commission's error?[2]

Statute Involved.

Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. §45(c) provides, in part, as follows:

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the

[2] Another question presented, but not urged, as a reason for granting this petition is:

> Where the Federal Trade Commission erroneously withholds relevant evidence from a respondent in an adjudicative proceeding before it, does a court of appeals with prospective appellate jurisdiction over such proceeding have jurisdiction under Section 1651 of the Judicial Code (28 U. S. C. §1651) to issue a writ of mandamus, or other appropriate writ, to compel the Commission to disclose and produce such evidence or, in the alternative, to dismiss such proceeding?

court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence."

Statement.

There is now pending before the Federal Trade Commission an adjudicative proceeding against Texaco Inc. ("Texaco"), the petitioner in this Court and below, arising out of gasoline price allowances which Texaco gave its service station dealers during periods of price war. A key issue in that proceeding is the legality of Texaco's grant of individual allowances from its tankwagon (wholesale) price to Texaco dealers, who found themselves competing directly with price-cutting stations selling rival brands of gasoline, to assist them to price their gasoline competitively

at the retail level. The Commission charges that these allowances resulted in price discriminations prohibited by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act [15 U. S. C. §13(a)], and that Texaco thereby also violated Section 5 of the Federal Trade Commission Act (15 U. S. C. §45), by allegedly fixing the resale prices of its gasoline to the public.[3]

Texaco has pleaded as a complete defense to the charges of price discrimination that its lower prices were "made in good faith to meet an equally low price of a competitor," and one of the principal issues in the pending proceeding is whether amended Section 2(b) of the Clayton Act applies where a lower price is given to a retail customer in meeting the competition of a retail competitor.

Since both the courts and the Commission have repeatedly declared that the settled administrative construction of a statute is entitled to great weight in resolving any statutory ambiguity, Texaco has endeavored to establish the facts concerning the Federal Trade Commission's prior construction of Section 2(b) as applicable to the price allowances in controversy. Texaco is seeking to prove that

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[3] The Commission's attack on Texaco's price allowances, both as alleged price discrimination and price-fixing, parallels that made against the Sun Oil Company for reducing the wholesale price of its gasoline to a filling station in Jacksonville, Florida, engaged in a retail price war. *Sun Oil Co.*, 55 F.T.C. 955 (1959); *rev'd sub nom., Sun Oil Co.* v. *F.T.C.*, 294 F. 2d 465 (5th Cir. 1961), *cert. granted*, 368 U. S. 984 (1962). In that proceeding, the Commission found both unlawful price discrimination and price-fixing. The Court of Appeals for the Fifth Circuit held that Sun had established a defense under amended Section 2(b) of the Clayton Act to the charges of price discrimination. It also found the Commission's other charge not to be supported by substantial evidence. This Court has granted certiorari limited to the question as to whether a wholesale seller establishes a defense under amended Section 2(b) of the Clayton Act by showing that it gave the discriminatorily lower price to its retail customer to aid the latter in meeting the price competition of a retail competitor.

the Commission's position in this and the parallel proceeding against the Sun Oil Company represents a shift in its views; that originally the Commission interpreted the meeting competition defense of Section 2(b) as permitting the very conduct it now challenges; that this earlier interpretation was carefully considered and formed the basis of official action closing, without the issuance of a complaint, many investigations; that the Commission made its earlier construction public in letters sent out to interested parties; that persons filing complaints with the Commission against Texaco or other oil companies based on price allowances of the kind now attacked were advised that no action was warranted because such conduct was lawful;[4] and that the Commission only retreated from this position under pressure built up by certain retail gasoline dealer trade associations and their Congressional spokesmen (R. 5-6, 85a-94a).

Proof of these facts will buttress Texaco's defense by showing that the settled and publicly announced administrative construction of Section 2(b) was that, as Texaco contends, it covered lower prices given a retail customer to meet competitors' prices at the retail level; that such administrative construction was arrived at by the agency charged with administering the statute after the most careful investigation and with due regard for its statutory obligations; that Texaco was fully justified in relying upon a construction of the law made public by the responsible agency itself; and that the arguments now urged by the Commission for a contrary construction are unsound and do not reflect any "expertise" entitled to weight as against its

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[4] Lawful not only under the Robinson-Patman Act but also under the Federal Trade Commission Act.

earlier position. Furthermore, such proof will explode any argument similar to that advanced by the Commission to this Court that "[t]he legislative history of Section 2(b) supports the view that the Section 2(b) defense does not permit a seller to meet the competition of his buyer's competitor." Petition of the Federal Trade Commission, p. 11, *Federal Trade Commission* v. *Sun Oil Company*, 368 U. S. 984 (1962). Patently, the Commission would not have adopted and adhered repeatedly to a contrary view of the Section 2(b) defense unless it believed such construction to be fully consonant with the legislative intent as reflected in the legislative history of the statute. That history was well known to the Commission when it adopted its earlier construction of the law, since the Commission had not only been active in the development of the legislative history but had just reexamined it in its brief to this Court in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951). Thus, the facts Texaco wishes to prove both support its position and negate the arguments advanced to support the contrary view.

Texaco initially attempted to prove the facts concerning the administrative construction of Section 2(b) through reprints, in various Congressional reports and hearings, of letters sent out over the signature of the late Harry A. Babcock, then Director of the Commission's Bureau of Investigation. These letters recite much of the pertinent information and expressly state that in the Commission's view the allowances now challenged were protected by the Section 2(b) defense. However, when these letters were offered by petitioner in the pending Commission proceeding to prove the earlier administrative construction, counsel for the Commission successfully objected to their admission as proof, "that that was the position taken by the Federal

Trade Commission at that time concerning temporary allowances . . ." (R. 48a). He disputed that the statutory construction contained in these letters was "by the Federal Trade Commission," terming it, instead, "by Mr. Babcock" (R. 48a).

In order, therefore, to secure other admissible and competent evidence concerning the administrative construction of the statute which would prove the truth of the facts stated in the Babcock letters, Texaco filed with the Commission the application which gave rise to the present proceeding. Under Rules 1.131 and 1.134[5] of the then Rules of Practice of the Commission (now Rules 1.161 and 1.164), Texaco asked the Commission to disclose and to produce all documents evidencing its earlier construction, prior to the shift in its views, that price allowances made to a retail dealer by his gasoline supplier to meet competition at the dealer level enjoyed the protection of the meeting competition defense and did not violate any law. Texaco attached to its application reprints of some of the documents requested, including three of the letters written by the late Mr. Babcock.

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[5] Rule 1.134 read, in part:

"§1.134 *Release of Confidential Information.* (a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be disclosed to a particular applicant.

"(b) Application by a member of the public for such disclosure shall be in writing, under oath, setting forth the interest of the applicant in the subject matter; a description of the specific information, files, documents, or other material inspection of which is requested; whether copies are desired; and the purpose for which the information or material, or copies, will be used if the application is granted. Upon receipt of such an application the Commission will take action thereon, having due regard to statutory restrictions, its rules, and the public interest."

To obviate any possible objection to the admissibility of these documents, Texaco also asked the Commission under Rule 3.17[6] of its then rules (now Rule 4.15) for a subpoena *duces tecum* and *ad testificandum* to the Secretary of the Commission to lay whatever evidentiary foundation might be necessary to introduce the requested documents into evidence.

Additional relief was sought at the same time. The Commission was asked to disclose all statements made by, or to, it *dehors* the record concerning the issues in the proceeding during its pendency against Texaco. It was further asked to produce all documents reflecting any improper commingling of adjudicative with other functions contrary to the Rules of the Commission and the requirements of due process. This relief was requested because press reports and other sources indicated that various gasoline dealer trade associations standing in the position of parties complainant in the proceeding against Texaco, assisted by their Congressional representatives, had both seen and communicated *ex parte* with members of the Commission during the pendency of the administrative hearings for

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[6] This rule read, in part:

"§3.17 *Subpoenas*—(a) *Subpoenas ad testificandum.* Application for issuance of a subpoena requiring a witness to appear and testify before a designated hearing examiner at a specified place and time may be made to the hearing examiner, or to the Commission.

"(b) *Subpoenas duces tecum.* Application for issuance of a subpoena requiring a witness to appear before a designated hearing examiner at a specified time and place and produce specified documents shall be made in writing to the hearing examiner or to the Commission, and shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope. Any motion to limit or quash such subpoena shall be filed within ten days after date of service of the subpoena."

the purpose of influencing the Commission's action in those hearings.[7]

Texaco's application was denied by the Commission *in toto* on March 9, 1962. The documents relating to the administrative construction of the meeting competition defense were deemed confidential and irrelevant[8]—in the teeth of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351-52 (1941) and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 246 (1951), in each of which this Court rejected a recent, revised construction given a statute by the Commission in favor of its original interpretation of the law.

Similarly, although the Commission *did not deny* that it had received materials *dehors* the record concerning the issues of this proceeding, *nor did it deny* that there had been a commingling of adjudicative with other functions,

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[7] One meeting which Texaco believes may have particularly prejudiced it took place, while hearings were pending, in the office of Senator Potter of Michigan at his invitation and was attended both by Chairman Gwynne and other representatives of the Federal Trade Commission and by the top officials of the Retail Gasoline Dealers Association of Michigan, Inc. It was followed by an enlargement and extension of the hearings to include Detroit, Michigan, as requested by the Association (R. 57a, 73a-79a).

[8] None of the reasons given by the Commission for saying that the documents sought by petitioner were confidential and irrelevant will bear examination. The Babcock letters are not "purely *internal papers*" but are "publicly known." From their face it is clear that the administrative interpretation they reflect was based upon "a thoroughness of consideration" entitling it to the greatest weight. That they were issued and made public by the Commission was acknowledged by Chairman Gwynne himself in 1956 when he, together with various members of the Commission staff, appeared before the Senate Small Business Committee. When the Babcock letters were referred to by the Chairman of the Committee as letters "sent out" by "the Commission," Chairman Gwynne not only did not dispute this description, but adopted it (R. 17, Ex. D; R. 71a).

The Commission's decision was handed down after its petition for certiorari in *Federal Trade Commission* v. *Sun Oil Company* had been granted by this Court. 368 U. S. 984 (1962).

it found no need to disclose to Texaco anything concerning these *ex parte* events.

Commissioner Elman refused to "concur in the Commission's disposition of the matter" on the ground "that the opinion fails to deal adequately with the issues raised by respondent's [Texaco's] application" (App. B, *infra*, p. 5b).

Invoking Section 5(c) of the Federal Trade Commission Act [15 U. S. C. §45(c)], Texaco thereupon promptly filed a petition in the Court of Appeals for the Fifth Circuit requesting leave to adduce the evidence suppressed by the Commission. Because Texaco does business and maintains offices within the Fifth Circuit, that court has jurisdiction of a proceeding under Section 5(c).[9]

The Court of Appeals in a brief *per curiam* opinion approved by Chief Judge Tuttle and Circuit Judge Wisdom, summarily denied Texaco's petition, without adjudicating the merits, on the ground that it lacked the power to intervene "at this stage of the proceedings," stating:

> "It is apparent that *however erroneous may be the decision of the Commission as to the exclusion of evidence during the hearings conducted by it*, such error may be reviewed and corrected in the event that the respondent below is finally required to cease and desist from the challenged method of competition or practice. The petitioner here has cited us to no authority to support its contention that the Court of Appeals may, at this stage of the proceedings, intervene and order the production of evidence

[9] Texaco also included in its petition a prayer under Section 1651 of the Judicial Code (28 U. S. C. §1651) for a writ of mandamus or other appropriate writ to compel the Commission to disclose and produce the evidence requested by Texaco or, in the alternative, dismiss its proceeding.

at the present hearing now being conducted by the Federal Trade Commission.[10]

"Without prejudice to whatever rights the petitioner may have in the event of a subsequent review of an order to cease and desist, the present petition is DENIED". (emphasis added). (App. A, *infra*, p. 1a-2a).

Reasons for Granting the Writ.

This case presents an important question concerning the meaning of a proviso found not only in the Federal Trade Commission Act but also in virtually every other statute governing the principal administrative agencies, including the National Labor Relations Act [29 U. S. C. §160(e)], the Securities and Exchange Act [15 U. S. C. §77(i)(a)], the Federal Power Act [16 U. S. C. §825 (l)(b)] and an omnibus agencies act [5 U. S. C. §1037(c)]. Section 5(c) of the Federal Trade Commission Act and its many statutory counterparts authorize an application to an appropriate court of appeals for leave to adduce additional evidence in an administrative proceeding. On the authority of this Court's decision in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938), the Court of Appeals for the District of Columbia in *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314 (1958)[11], held that such a proviso makes an application to adduce evidence the exclu-

[10] It is difficult to understand this statement in view of the fact that Texaco, in its jurisdictional statement to the Court of Appeals, specifically relied upon *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938), and *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314 (App. D. C. 1958) (R. 2-3), discussed *infra*, p. 12, *et seq.*

[11] For the subsequent history of this case, see 277 F. 2d 78 (App. D. C. 1959); 367 U. S. 1 (1961).

sive means for securing judicial relief where an administrative agency wrongfully withholds relevant evidence from a party to a proceeding before it, and requires such application to be made when production is first refused. Failure to seek such interlocutory relief, the Court of Appeals said, bars all future complaint. 254 F. 2d at 322-24. Yet the Court below holds such interlocutory relief to be wholly unavailable. It denies the existence of any authority in itself even to entertain Texaco's application at this time. Any error, it says, "may be reviewed and corrected in the event that the respondent below [Texaco] is finally required to cease and desist from the challenged method of competition or practice" (App. A, *infra*, p. 2a). The Court below has thus placed itself squarely in conflict with the Court of Appeals for the District of Columbia. This conflict among the courts of appeal on a recurrent and ubiquitous question of judicial review threatens great hardship to large numbers of private litigants and should be resolved by this Court.

1. *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* which the Court of Appeals for the District of Columbia read as compelling a result directly contrary to that reached below, was a proceeding brought to review a cease and desist order issued by the National Labor Relations Board. The Government successfully argued both in the Second Circuit [95 F. 2d 390 (1938)] and in this Court that the failure of the petitioners to apply for leave to adduce additional evidence foreclosed complaint that the Board's refusal to receive "highly important" evidence deprived them of procedural due process (305 U. S. at 226, 228-29). The Court said:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10 (e) (f). Petitioners did not avail themselves of this appropriate procedure" (305 U. S. at 226).

2. Thereafter, one court of appeals after another was persuaded by counsel for the Federal Trade Commission and the National Labor Relations Board that *Consolidated Edison* barred them in a proceeding brought to review, or enforce, a final administrative order from considering error in the exclusion of evidence.[12] The Third, Fourth and Ninth

[12] Because of the virtual identity between the pertinent provisions of the National Labor Relations Act and Section 5(c) of the Federal Trade Commission Act, *Consolidated Edison* was urged as being equally applicable to Commission proceedings. Thus, the brief for the Federal Trade Commission in this Court opposing certiorari in *California Lumbermen's Council* v. *Federal Trade Commission*, 312 U. S. 709 (1941), reads in part as follows:

> "The provisions of section 10(e) of the National Labor Relations Act (29 U. S. C., Supp. V, sec. 160 (e)) providing for court review of Board orders are substantially the same as those of section 5 (c) of the Trade Commission Act, and the provisions of section 10 (e) dealing with application to the reviewing court for leave to adduce additional evidence, are word for word the same as the corresponding provisions of section 5 (c), except for the designations of the different governmental agencies involved" (pp. 12-13).

See also Brief for the Federal Trade Commission, pp. 31-32, *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968 (3d Cir. 1941).

Circuits all so held. *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968 (3d Cir. 1941); *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214 (4th Cir. 1944); *California Lumbermen's Council* v. *Federal Trade Commission*, 115 F. 2d 178 (9th Cir. 1940), *cert. denied*, 312 U. S. 709 (1941). Counsel for the administrative agencies successfully argued that the appropriate remedy for error in an evidentiary ruling was an application for leave to adduce the excluded evidence. Because the employer had not made use of this remedy, the Fourth Circuit, viewing itself bound by the decision of this Court, reluctantly enforced an order of the Labor Board despite the fact that the Board had "denied the employer a fair opportunity to present important evidence relevant to its defense." *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, *supra* at 215.[13]

3. In *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314 (App. D. C. 1958), the Government successfully maintained not only

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[13] The Court of Appeals for the Eighth Circuit escaped such a harsh result by treating the petition for review as including an application for leave to adduce additional evidence. *Mississippi Valley Structural Steel Company* v. *National Labor Relations Board*, 145 F. 2d 664 (1944). Only one court, however, flatly rejected the Government's argument, and that one, curiously, was the Court of Appeals for the Second Circuit, in which *Consolidated Edison* originated. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 114 F. 2d 80, 83 (2d Cir. 1940), Judge Learned Hand, without discussing or referring to *Consolidated Edison*, reviewed on its merits the claim that evidence had been wrongfully excluded by the Commission, brushing aside as totally without merit the argument of Commission counsel that the remedy provided by Section 5(c) was "plain, adequate and exclusive" and that the failure to pursue it foreclosed further complaint. In this Court, neither party referred to the question and the opinion of this Court affirming the decision of the Second Circuit adverse to petitioner on the merits makes no reference to it. 312 U. S. 457 (1941).

that an application for leave to adduce the excluded evidence was the sole remedy for the erroneous suppression of relevant evidence by an administrative agency, but that such remedy had to be invoked promptly upon the agency's action. In that case the Communist Party sought to set aside the order of the Board because it had refused production of certain memoranda wanted for purposes of cross-examination. But the Court of Appeals, viewing itself bound by *Consolidated Edison*[14], held that "the point respecting the refusal to order production" of the memoranda was not available upon the petition for review since the Party had not invoked its statutory remedy when the Board "*first refused production*" (254 F. 2d at 322-324). The Court of Appeals explicitly recognized that its ruling "creates a right to interlocutory relief" (254 F. 2d at 323).

When the Communist Party thereafter sought to cure the defect by making a motion to adduce the excluded evidence, it was denied as untimely. In explaining its action when the entire proceeding again came before it for review (277 F. 2d 78), the Court reiterated that the right to complain of the refusal to produce evidence was lost unless a motion to adduce was promptly made. 277 F. 2d at 81.

When this Court came to review the *Communist Party* case, it never reached the question which had preoccupied the Court of Appeals since it found waiver of the alleged

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[14] The Court of Appeals said that as it read *Consolidated Edison*,

> "it means that, when proffered evidence is denied receipt by the trial tribunal in a case in which a statute similar to Section 10(e) of the National Labor Relations Act applies, the profferor must apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence; if he fails so to move he cannot successfully present the point on appeal. The rule applies even though the evidence is 'highly important' and is brief and immediately available and rejection of it is 'unreasonable and arbitrary' " (254 F. 2d at 323).

error on other grounds. 367 U. S. 1, 32 (1961). Chief Justice Warren, who alone considered the question in his dissent, concluded that *Consolidated Edison* was inapplicable to documents sought for purposes of impeachment and consequently found it unnecessary to reevaluate that decision. 367 U. S. at 115, 122.

However, the Solicitor-General in his brief to this Court in *Communist Party* strenuously defended the conclusion reached by the Court of Appeals. He argued that, as the Court of Appeals had held, failure to make an application for leave to adduce the excluded evidence barred subsequent complaint:

> "But even if petitioner were correct that the Board erred and that this error was prejudicial, this case is controlled by *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197. Under a provision in the National Labor Relations Act which is substantially the same as Section 14(a) of the Act at bar, this Court recognizes that the action of the Board in refusing to allow the company to adduce additional 'highly important' testimony 'was unreasonable and arbitrary' (305 U. S. at 226). Nevertheless, the case was not reversed and remanded to the Board, because the company did not avail itself of the appropriate procedure by applying to the court of appeals for leave to adduce additional evidence as specified in the statute. [Citations omitted.] Similarly, petitioner here has failed to follow the applicable remedy under Section 14(a)—although it knew of the remedy as shown by a motion to adduce evidence as to the credibility of three of the Attorney General's witnesses made prior to the original court of appeals' decision (351 U. S. at 119-120)—and it is therefore now barred, whether or not the Board did in fact err." Brief for Respondent, pp. 308-09.

The Solicitor-General made it plain that while he, unlike the Court of Appeals, did not read the statute as *compelling* the respondent to seek *interlocutory* relief on pain of waiving any error, he nevertheless viewed such relief as not only available but desirable:

> "Petitioner's difficulties with Section 14(a) clearly reflect the erroneous belief that this provision is merely a procedural technicality. Instead, *it serves the useful purpose of allowing interlocutory relief in situations where the administrative agency's time and effort would often be wasted if appeal from the final order were the only remedy.* And even if the injured party does not seek interlocutory relief—and Section 14(a) does not seem to compel it—the reviewing court can consider the motion to adduce evidence separately and expedite the remand to the administrative agency if the agency has erred. Nor is petitioner correct in stating (Br. 141) that the *Consolidated Edison* holding would produce multiple interlocutory appeals. Despite the existence of that decision for many years, such multiple appeals have not apparently resulted, probably because administrative agencies generally give parties before them great latitude in adducing evidence" (*Ibid.*, p. 310) (*emphasis supplied*).[15]

In short, according to the Solicitor-General, in order to obtain judicial review of the erroneous withholding of evidence by an administrative agency, a party must file a motion to adduce in the Court of Appeals, but he has the option of doing so either immediately or after confronted

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[15] If the appropriate remedy where evidence is wrongfully withheld is an application for leave to adduce such evidence, no reason appears why such an application should be delayed until completion of the administrative proceeding. On the contrary, as the Solicitor-General pointed out in his brief to this Court, permitting interlocutory relief may save the administrative agency time and effort. *Cf. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

by a final agency order; and, in either event, the Court of Appeals must entertain the motion.

4. In view of this Court's decision in *Consolidated Edison*, as construed by the Court of Appeals for the District of Columbia in *Communist Party*, petitioner felt obliged, when the Federal Trade Commission declined to produce the documents pertinent to its defense, to "apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence" when the Commission "first refused production." 254 F. 2d at 322-23.

Yet the court below summarily denied Texaco's petition on jurisdictional grounds, believing that it lacked authority to grant interlocutory relief "however erroneous may be the decision of the Commission." Left unclear by its opinion, however, is whether it deemed the motion to adduce as necessary but premature, or as unnecessary at any time because it will consider an error in the exclusion of evidence upon review of a cease and desist order. If it intended the latter, as seems likely from other opinions by it,[16] then the Fifth Circuit is in conflict with decisions of the Third, Fourth and Ninth Circuits which have all held that such an error cannot be considered absent a motion to adduce. At the very minimum, however, the Fifth Circuit is in flat disagreement with the *Communist Party* decision of the District of Columbia Circuit and the views expressed by the Solicitor General.

5. Patently, counsel for the Commission, in opposing the petition below, did not present the same view of the law

[16] The Fifth Circuit has reviewed evidentiary errors in passing upon petitions to review or enforce administrative orders. *National Labor Relations Board* v. *Capitol Fish Co.*, 294 F. 2d 868, 875 (1961); *National Labor Relations Board* v. *Chambers Mfg. Co.*, 278 F. 2d 715, 716 (1960).

that the Government put before the District of Columbia Circuit and this Court in the *Communist Party* case. That the Government should shift positions in this manner is intolerable. It is even more intolerable that the courts of appeal should be led thereby to adopt contradictory positions which bar relief to litigants in administrative proceedings regardless of what route is taken.

Unless the conflict among the courts of appeal is resolved, a trap is created which the government can use to ensnare unwary litigants before our most important administrative agencies by depriving them of judicial review where evidence is wrongfully suppressed. The only certain way to avoid this trap will be to apply at once to the court of appeals for leave to adduce evidence, as did petitioner. This course of action will be necessary even where the aggrieved party knows that the court to which he applies will, like the court below, dismiss the interlocutory application, since he cannot be sure that the court ultimately called upon to review the agency's final order[17] will not follow the *Communist Party* case.[18]

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[17] Where more than one court of appeals has jurisdiction, there is no assurance that the court before which the private litigant seeks interlocutory relief will be the court before which final review proceedings are initiated, unless the litigant controls the choice of courts. Where, as in the National Labor Relations Act, the agency may initiate review proceedings, the private litigant clearly lacks such control.

[18] Petitioner is not the first private litigant forced to make a motion to adduce because of uncertainty as to the law. See "Notice of Petition and Petition of Carter Products, Inc., pursuant to Title 15 U. S. C. Section 45 (e) for Leave to Adduce Additional Evidence, and Accompanying Memorandum," pp. 7-10, *Carter Products, Inc.* v. *Federal Trade Commission*, 201 F. 2d 446 (9th Cir. 1953), *vacated and remanded*, 346 U. S. 327 (1953). At least one law review commentator thinks that, under the law as it now stands, careful practitioners can have no assurance that interlocutory appeals are unnecessary on agency rulings. Comment, 36 N. Y. U. L. Rev. 1371 (1961).

A conflict which is potentially so productive of hardship and expense for so many litigants should be resolved by this Court. If the District of Columbia Circuit is right in holding interlocutory relief to be appropriate in a situation like the one at bar, the court below should be instructed to take jurisdiction; if, however, the court below is correct, litigants before administrative agencies should be freed from the burden and expense of pursuing fruitless procedures, for fear of waiving their rights, when an agency erroneously excludes or suppresses relevant evidence.

Conclusion.

The law is in a state of hopeless confusion because of the irreconcilable conflict among the courts of appeal concerning the procedure to be followed in order to secure judicial review of an error in the suppression or exclusion of evidence relevant to a respondent's defense before an administrative agency.

1. Must the aggrieved party make a motion to adduce the evidence before an appropriate court of appeals?

2. If so:

(a) Must he do so promptly after the adverse administrative ruling while the proceeding is still pending?

(b) Must he do so at the conclusion of the administrative proceeding after a final order has been entered against him?

(c) Does he have the choice of making the motion at either point in time?

3. Or is such a motion unnecessary at any time because the error will be considered by the court of appeals upon a petition to review or enforce the final agency order?

In view of the importance of these questions to the administration of the Federal Trade Commission Act and a host of other statutes governing administrative agencies, and the injustice done litigants because of the uncertainty created by the conflicting answers given by the various circuits, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 5, 1962

Appendix A.

Opinion of the Court of Appeals for the Fifth Circuit.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19590.

TEXACO, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Order on Petition for Leave to Adduce Additional Evidence and for a Writ of Mandamus or Other Appropriate Writ to the Federal Trade Commission.

April 30, 1962.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge.

PER CURIAM:

This petition by Texaco, Inc. for leave to adduce additional evidence in a proceeding now pending before the Federal Trade Commission entitled "In the Matter of the Texas Company, a corporation, F. T. C. Docket No. 6898," seeks to cause this Court, or a judge thereof, to reverse certain rulings by the examiner and the Federal Trade Commission touching on the right of the petitioner to have certain files and records of the Commission made available for introduction in evidence on the hearing below.

Appendix A.

The jurisdiction of this Court to review an order of the Federal Trade Commission is found in 15 U. S. C. A. 45(c). Such jurisdiction arises only from a cease and desist order entered by the Commission. That section of the Federal Trade Commission Act expressly provides, "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken. . . ."

It is apparent that however erroneous may be the decision of the Commission as to the exclusion of evidence during the hearings conducted by it, such error may be reviewed and corrected in the event that the respondent below is finally required to cease and desist from the challenged method of competition or practice. The petitioner here has cited us to no authority to support its contention that the Court of Appeals may, at this stage of the proceedings, intervene and order the production of evidence at the present hearing now being conducted by the Federal Trade Commission.

Without prejudice to whatever rights the petitioner may have in the event of a subsequent review of an order to cease and desist, the present petition is denied.

Appendix B.

Order and Opinion of the Federal Trade Commission.

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN
EVERETTE MACINTYRE

IN THE MATTER of THE TEXAS COMPANY, a corporation.	Docket No. 6898

Order Denying Application.

Respondent having filed an application requesting disclosure of certain confidential documents and materials and the issuance of a subpoena directed to the Secretary of the Commission; and

The Commission having determined, for reasons stated in the acompanying opinion, that said application should be denied:

IT IS ORDERED that the aforesaid application of the respondent for the disclosure of documents and materials and the issuance of a subpoena be, and it hereby is, denied.

By the Commission, Commissioner Elman not concurring.

JOSEPH W. SHEA,
Secretary

SEAL

ISSUED: March 9, 1962.

Appendix B.

Opinion Accompanying Order Denying Application.

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN
EVERETTE MACINTYRE

IN THE MATTER of THE TEXAS COMPANY, a corporation.	Docket No. 6898

On Application for the Release of Documents and the Issuance of a Subpoena.

By the Commission:

Respondent, pursuant to §§1.131 and 1.134 of the Commission's Rules of Practice, has applied for the disclosure of certain documents and materials, and pursuant to §3.17 of the Commission's Rules, published May 6, 1955, as amended, has applied for issuance of a subpoena to the Secretary of the Commission directing him to appear and to testify and to bring with him the documents and materials requested in this application.

The documents sought are in two general categories: (a) those having to do with "the administrative construction of the meeting competition provisions" of the amended

Clayton Act or any other statute barring price fixing and (b) alleged "ex parte communications . . . made outside the regular adjudicative process" with respect to this proceeding and other "communications" between the Commission or any member or employee in the decisional process in the proceeding and any agent or employee engaged in investigative or prosecutive functions with respect to (1) any investigation of respondent's pricing activities in 1957 and 1958 in Detroit, Michigan; (2) any enlargement of the scope of the hearings herein; (3) any amendment or supplementation of the complaint; and (4) the merits of this or a factually related proceeding.

In determining the action to take on a request for the release of documents, the Commission will consider not only the confidential and privileged nature of the material, but also the purpose for which the respondent intends to use it. *Postal Life and Casualty Insurance Company*, 52 F. T. C. 651 (1956).

Here respondent contends that the decision in *Sun Oil Co.* v. *Federal Trade Commission*, 294 F. 2d 465 (5th Cir. 1961), indicates the importance of developing facts bearing upon the administrative construction of relevant statutes. A petition to review in this case was filed with the United States Supreme Court by the Solicitor General on behalf of the Federal Trade Commission, December 22, 1961.

Respondent also asserts, on the question of relevance and materiality, that the United States Supreme Court has been persuaded to reject a statutory construction urged by the Commission, by the fact, among others, that it was inconsistent with the interpretation previously placed upon the critical language by that body. The cases cited to support this argument are: *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351-52 (1941); and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 246 (1951). In the *Bunte Bros.* case, the want of an assertion of

power by the Commission was considered in determining whether such power was actually conferred. There the court referred to the Commission's unsuccessful attempt to secure the particular authority from Congress. In the *Standard Oil* decision, the court mentioned the "widespread understanding" as to the construction of the law and said that this understanding was reflected in "actions and statements of members and counsel" of the Commission. In documenting this observation in a footnote, the court referred only to public information and, in fact, seemed to emphasize the official action of the Commission itself in issuing cease and desist orders in which were inserted "savings" clauses bearing on the construction of the statute. Compare *United States v. E. I. duPont de Nemours & Company*, 353 U. S. 586 (1957). There the court stated that the failure of the Commission to act was not a binding administrative interpretation on the issue under consideration. (Id. 590.)

The information and documents considered by the Court in *Bunte Bros.* and *Standard Oil Co.* are on a different footing from the kind of materials here sought. The former were publicly known; the latter involved the inner workings of the agency. The implication of a thoroughness of consideration could not be drawn in the case of purely internal papers as it might be for documents or statements issued or made public by the Commission or one of its members. We conclude that the confidential documents here considered would not be relevant to any issue in this proceeding. Moreover, such documents might include, among other things, correspondence or other material relating to or identifying applicants or complaining parties. Such material is treated with strict confidentiality by the Commission. See §1.15 of the Commission's Rules of Practice.

Respondent, as to the second category of documents requested, asserts that enough has been disclosed to make

it clear that there are materials which have not been made a part of the public record bearing upon the possible commingling of the adjudicative and enforcing functions and the receipt of *ex parte* communications. In the principal instance referred to, it appears that a former chairman of the Commission and a member of the Commission's staff met with certain industry members. Respondent makes no assertion that the meeting itself was in any way improper and states that it seeks only to ascertain the facts. We cannot open up confidential files on such vague and speculative grounds.

Moreover, respondent's contention appears to be mainly against alleged contacts involving certain third party organizations or persons. These organizations and individuals, however, are not parties to this proceeding. Information received from such sources on an *ex parte* basis does not come within § 4.27 of the Commission's Rules of Practice dealing with *ex parte* communications. The documents in the second category of the request also might involve the name of applicants or complaining persons, although we here make no reference to the individuals and organizations listed; and such information, as above indicated, is held in strict confidence.

For the above-stated reasons, we will not grant a release of the requested documents and materials. We need not discuss the application for the issuance of a subpoena directed to the Secretary of the Commission since, without the documents, the subpoena would serve no purpose.

Accordingly, respondent's application for access to documents and materials and for the issuance of a subpoena will be denied.

Commissioner Elman, being of the view that the opinion fails to deal adequately with the issues raised by respondent's application, does not concur in the Commission's disposition of the matter.

March 9, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

TEXACO INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 234

TEXACO INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-2a) is reported at 301 F. 2d 662. The opinion (Pet. App. B, 2b-5b) and order (*id.*, 1b) of the Federal Trade Commission are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1962 (Pet. App. A, 1a-2a). The petition for a writ of certiorari was filed on July 6, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that, under Section 5(c) of the Federal Trade Commission Act, it was without jurisdiction to review rulings by the Federal Trade Commission on the introduction of evidence or on the production and relevancy of documents from the files of the Commission, prior to the issuance of a cease and desist order.

STATUTE INVOLVED

Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(c), provides as follows:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that

such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

STATEMENT

On September 27, 1957, the Federal Trade Commission issued a complaint charging petitioner, Texaco Inc. (formerly The Texas Company), with violations of Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), and of Section 5 of the Federal Trade

Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45 (R. 1a-8a),[1] in the Portsmouth-Norfolk-Virginia Beach, Virginia, area. The complaint was supplemented on March 31, 1959, to include similar activities in the Detroit, Michigan, area occurring after the filing of the original complaint (R. 9a). The proceedings on the complaint are currently pending before the hearing examiner, and there has been neither an initial decision by the hearing examiner nor a Commission determination whether a cease and desist order will be issued.

In the course of the hearing, petitioner offered for receipt in evidence copies of letters signed by Harry A. Babcock, the then Director of the Bureau of Investigation of the Commission (R. 48a), and applied for the disclosure by the Commission of "[a]ll documents evidencing the administrative construction of the meeting competition provisions" of the Robinson-Patman Act (R. 38a) and all communications relating to the March 31, 1959, supplementation of the complaint (R. 39a), and for a subpoena *duces tecum* and *ad testificandum* to the Secretary of the Commission for the production of such material (R. 60a). The material requested was extensive and covered Commission files for several years (R. 38a-43a). Petitioner claimed that the proffered letters and the demanded material from the Commission files were relevant to proof of prior administrative constructions of the "to meet an equally low price of a competitor" defense under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act (Pet. App. B, 2b-3b) and to petitioner's assertions that the supple-

[1] "R" refers to the printed Petition and Appendix filed by the petitioner in the court of appeals.

mentation of the complaint to include Detroit activities involved improper *ex parte* activities by members of the Commission (Pet. App. B, 3b).

The "Babcock" letters were admitted in evidence by the hearing examiner, after a colloquy as to whether the statements in the letters represented a construction of Section 2(b) by the Commission or merely a statement of the views of the then Director of the Bureau of Investigation of the Commission (R. 48a). On March 9, 1962, the Commission denied the application for the production of documents and materials from its files and for the subpoena to the Secretary (Pet. App. B, 4b). In its opinion accompanying the order of denial, the Commission, among other things, pointed out that only adjudicative and publicly-announced official Commission action might be pertinent to determining the "administrative interpretation" of a statute, and that internal memoranda and discussions were confidential, as was information and material identifying complainants (Pet. App. B, 2b-4b). The Commission further found that the information allegedly received on an *ex parte* basis might involve complainants not parties to the proceedings and hence could not be disclosed (Pet. App. B, 5a).

On April 5, 1962, petitioner applied to the court of appeals for an order requiring the Commission either (1) to appear by its Secretary and produce the documents, disclose them, and permit petitioner to adduce them in evidence, or (2) to dismiss the Commission's proceeding (R. 1-24). On April 10, 1962, the court of appeals denied the petition *per curiam*, holding that it did not have jurisdiction to intervene in, and to order the production of evidence at, a hearing contem-

poraneously being conducted by the Federal Trade Commission; that under Section 5(c) of the Federal Trade Commission Act (see pp. 2-3, *supra*), the application for review was premature; and that jurisdiction to review would not arise unless and until the Commission entered a cease and desist order (Pet. App. A, 1a-2a). The decree was without prejudice to whatever rights Texaco might have in the event of a subsequent review of an order against it to cease and desist (Pet. App. A, 2a).

ARGUMENT

The court of appeals was clearly correct in holding that Section 5(c) of the Federal Trade Commission Act[2] gave it no jurisdiction to entertain an appeal prior to the issuance of a cease and desist order, and "at this stage of the proceedings, [to] intervene and order the production of evidence at the present hearing now being conducted by the Federal Trade Commission" (Pet. App. A, 2a). Contrary to petitioner's assertions, the circuits are not in conflict on the question presented; and, as the court below noted (*ibid.*), petitioner has not cited any case which construed Section 5(c) or any similar statute as authorizing or requiring a review of evidentiary rulings by an administrative board or commission prior to a final order. The decisions of this Court clearly sustain the judgment of the lower court

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[2] The language of Section 11(c) of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (Supp. III) 21(c), parallels that of Section 5(c) on the question presented. Since Section 5(c) provides for judicial review, including review of rulings on evidence after entry of a cease and desist order, there is no issue involving 28 U.S.C. 1651, and petitioner does not urge questions under that provision as a reason for granting its petition (see Pet. 2, n. 2).

on the only question raised in the petition, and that question does not warrant review by this Court.

1. Section 5(c) of the Federal Trade Commission Act provides for an appeal only from a final cease and desist order of the Commission,[3] and for a review of excluding evidence rulings by a motion for leave to adduce filed in the court of appeals only upon such an appeal. Thus, jurisdiction is acquired by a court of appeals upon the filing of a petition for review by a person "required by an order of the Commission to cease and desist from using any method of competition or act or practice . . ." The prayer of the petition contemplated by the statute is "that the order of the Commission be set aside." The time for filing the petition is "sixty days from the date of the service of such order." One situs or venue is "where the method of competition or the act or practice in question was used." Upon the filing of the petition the court has jurisdiction, among other things, "to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed . . ." In addition, "either party" may move for leave to adduce additional evidence before the court. In the event that the court grants the application for leave to adduce additional evidence and orders further proceedings before the Commission, the Commission thereafter may "modify its findings . . ., or make new findings, . . ., and . . ., file such modified or new findings,

[3] Such an order can be entered only after a hearing and the filing of the findings and report required under Section 5(b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(b) and under Section 11(b) of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (Supp. III) 21(b).

. . . and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence." In short, the provisions that make up Section 5(c) are all in terms of, and assume the existence of, a pre-existing final cease and desist order of the Commission. Plainly enough, that statute is but one of a number of statutes codifying the general rule, long recognized by this Court, that interlocutory rulings by administrative agencies are not appealable while the proceedings to which they relate are still pending and before the agency's final order. *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Adams* v. *Federal Trade Commission*, 296 F. 2d 861, 864-65 (C.A. 8).

2. The petitioner's assertions (Pet. 11-20) concerning *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, and *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, are based on erroneous assumptions regarding the questions presented and decided in those cases. In both cases, unlike the case at bar, appeals were taken to the court of appeals from final administrative orders, and the question presented was whether timely and appropriate motions to adduce additional evidence had been made in the court of appeals in connection with, or after the initiation of the appeals from the final orders. In the *Consolidated Edison* case, where no motion to adduce was filed, the petitioners' claim was that an assignment of error served the same purpose. The holdings of both the Second Circuit (95 F. 2d 390, 397) and of this Court (305 U.S. at

226), rejecting that contention, emphasized that the statute provides a motion to adduce filed in the court of appeals as the appropriate remedy for the improper exclusion of evidence. The *Consolidated Edison* case does not hold, nor even intimate, that to preserve one's right to review of an exclusionary ruling there must be an appeal from such a ruling prior to a final administrative order. It merely holds that exclusionary rulings must be attacked by motion to adduce rather than by an assignment of error. The same question was at issue in the other cases cited by petitioner (Pet. 14), all of which involved statutory appeals from *final* administrative orders.

The *Communist Party* case likewise did not present a question of whether an appeal from a ruling on evidence may, or must, be taken prior to a final administrative order. The court of appeals decision reported at 254 F. 2d 314, was the second appeal from final agency orders, and the Communist Party did not on either appeal make a motion in the court of appeals to adduce additional evidence relating to the "Gitlow" memoranda but relied on an assignment of error. It was not until after the court of appeals opinion in the second appeal that the Communist Party filed any motion in the court of appeals to adduce the "Gitlow" memoranda. Thus the extracts from the opinion of the court of appeals in the *Communist Party* case cited by petitioner (Pet. 14-15) dealt with an attempt by the Communist Party to secure a reversal by the court of appeals of the Board's final order on account of a ruling on the production of evidence for which no motion to adduce had been filed in either the first or the second

appeal on the merits to the court of appeals.[4] The court of appeals' statement that its ruling "creates a right to interlocutory relief" (254 F. 2d at 323) appropriately describes the procedure required by the statute insofar as an opportunity is provided for the court of appeals to resolve evidentiary questions and to determine whether a reopening of the hearing is required before making a judicial determination on the merits. There is a clear distinction between provision for (i) interlocutory relief during the course of judicial proceeding to review a *final* administrative order and (ii) an interlocutory appeal taken during an administrative hearing. The former, which is authorized by Section 5(c), permits the court of appeals to defer a final ruling upon the merits until a more complete record is considered by the administrative agency; the latter, which is neither authorized nor required, would permit appeals even before the administrative agency has ruled on the merits of the case.[5]

[4] This Court noted that no motion to adduce on the "Gitlow" memoranda had been filed in the court of appeals (367 U.S. 1, 30).

[5] Petitioner's assertions that the government has taken the position that statutes similar to Section 5(c) require or authorize an appeal on evidentiary rulings prior to a final administrative order or determination are without foundation. The statements from the government's brief in the *Communist Party* case quoted by petitioner (Pet. 16, 17) plainly assumed a situation in which the court had a final agency order before it (as, of course, the court in the *Communist Party* case had).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1962

☆ U. S. GOVERNMENT PRINTING OFFICE 1962—649431/P. 100